United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

77-1018

Argued By
SALTEN RODENBERG
Buffalo, New York

B
P/S

In The

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 77-1018

THE UNITED STATES OF AMERICA,

Appellee,

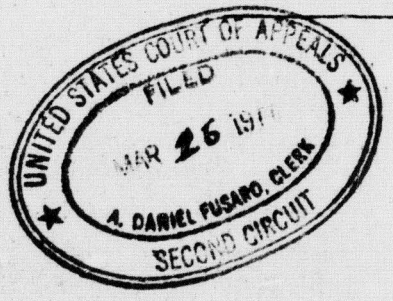
vs

MICHAEL PATRICK BARRETT,
FERDINAND SANTANA,
JOSEPH CHARLES FERRARO,

Defendants-Appellants.

BRIEF FOR DEFENDANT-APPELLANT SANTANA

Appeal from the Judgment of Conviction
of the United States District Court for
the Western District of New York at
Indictment No. CR. 1976-95



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UNITED STATES COURT OF APPEALS

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STATEMENT OF THE CASE

The defendant Ferdinand Santana and two others were jointly indicted on June 24, 1976, accused in a three-count indictment of robbing a Chase Manhattan Branch located in a small plaza, Colvin-Eggert, in the Town of Tonawanda, New York. The defendants were tried jointly.

The defendant Santana was convicted on each of three counts included in the indictment which accused him of violations of §§2113 (a)(b)(d) of the United States Code. The other defendants were convicted for a violation of §2113(b), the theft of some $9900.00. The jurors disagreed about the innocence or guilt of the co-defendants pertinent to the first and third counts. (§2113a & d).

No pretrial motions were made on behalf of the defendant Santana.

During the trial proper there appeared a half-page article published in the Buffalo Courier-Express disclosing interviews had by the newspaper reporter in question with Richard J. Arcara, United States Attorney for the Western District, and a Mr. Gibbs, a member of the Federal Bureau of Investigation. (Exhibit 1; A-9)

Counsel moved for a mistrial predicated upon the adverse illegitimate effect the article could have upon the jurors, stressing to the Court that the interviews granted by the United States Attorney and the F.B.I. Agent were granted voluntarily with the full knowledge that the article would have a devastating impact upon an on-going trial. That the factual circumstances reported in the newspaper article made the basis for a motion for mistrial, were in many instances identical with the facts brought out by the United States Attorney on trial. That motion was denied. (R-1018-1035; 1050-1056) (A-11)

The Court denied motions to dismiss the indictment against the defendant Santana made to the Court at the close of the Government's case and at the conclusion of all of the testimony.

QUESTIONS PRESENTED ON APPEAL

1. Did the Court commit reversible error by its refusal to declare a mistrial because of the circumstances surrounding the appearance of a newspaper article contained in the October 29, 1976, issue of the Buffalo Courier-Express?

2. Did the supplemental instructions, some of which were made gratuitously by the Court, operate to deprive the defendant of a fair trial, particularly where:

a. a note to the jurors made known that the jurors stood eleven to one for conviction, and

b. That the juror holding out was doing so because he would not accept circumstantial evidence as sufficient?

STATEMENT OF FACTS

The Colvin-Eggert branch of the Chase Manhattan Bank was held up a few minutes before noon June 16, 1976.

Three armed men all wearing hoods burst through the entranceway, two of them vaulted the teller's counter, forced each of two tellers to surrender all of the proceeds on hand in the various drawers Additionally, they scoopel up three canvas bags which had been prepared earlier for a retail food outlet, Super Duper. The canvas bags contained $500.00 in singles, $400.00 in quarters, $100.00 in dimes, $60.00 in nickels and $20.00 in pennies. The total take was $9,911.00.

It would appear from the trial testimony that one or more of the robbers escaped in a white and blue Cadillac, license number EC-881. (R-347) (A-8). The assistant manager succeeded in glimpsing this license number as the car sped away.

The police were on the scene within moments, since one of the bank personnel had activated the burglar alarm as the bandits were rushing from the bank. The getaway car license was given to the police; an alert was flashed over police bands.

Several witnesses had seen the three men fleeing from the bank. One witness in particular claimed that he had noticed one of the thieves carrying what appeared to be a pillowcase.

Another individual waiting for his automobile in a garage, located close to the bank, was able to see the robbery in progress. There was no on-the-scene eyewitness identification.

Between 11 and 11:30 of that particular morning one Carlton

Gilmour, retired, living at 31 Joseph Drive, part of a four-building apartment complex, happened to be looking out the window. He saw a car pull into Joseph Drive and back into the area before his front window. The driver blew the horn several times. Immediately thereafter he saw a man run toward the vehicle and enter it. Between five and eight minutes elapsed before three men jumped out of the car, one running around the south side of the apartment building Gilmour lived in, the other two ran around the north side. Mr. Gilmour took the precaution of jotting down the license number of the vehicle, which was 455-EDQ. The car was a dark green LeMans.

Within minutes of the alert the car was discovered in a parking space behind an apartment in the Joseph Drive apartment complex.

The tenant Carlton Gilmour gave the police the license number of the LeMans, simultaneously explaining to them that he had jotted the number down because he was suspicious of the occupants. The police quickly determined that the LeMans belonged to a Miss Cheryl May, 886 Richmond Avenue, Buffalo. Numerous officers from the Town of Tonawanda Police Department, the Buffalo Police Department and the Federal Bureau of Investigation arrived at the Richmond Avenue location within a very short time.

The LeMans was parked in the parking area behind the apartment building housing the four-apartment complex from 882 to 888 Richmond Avenue, inclusive.

A delay of some 45 minutes occurred between the arrival of the police at Richmond Avenue and forcible entry into 886 Richmond.

The defendant Santana was not found by the police in either 886 or 888 Richmond Avenue, the apartment where a substantial amount of money taken in the bank robbery was recovered, as were guns similar in appearance to those flashed by the hold-up men, clothing similar to that worn by the bandits and bait money planted by the bank in a teller's drawer.

The defendant-appellant was arrested in the apartment at 882 Richmond Avenue immediately after the tenant ran outdoors screaming that there was a man with a gun in her home. No gun was ever recovered on those premises.

Subsequently the LeMans was impounded and examined for fingerprints. One fingerprint purporting to be that of this appellant was lifted from the exterior right front door portion of the car.

One of the hoods recovered at either 886 or 888 Richmond Avenue bore hair similar to hair samples taken from Mr. Santana.

Nothing used in the prosecution of the alleged criminal activity originated from a search of 882 Richmond Avenue. The co-defendants were arrested in a different apartment of the same apartment complex.

POINT I

THE COURT COMMITTED REVERSIBLE ERROR BY ITS REFUSAL TO DECLARE A MISTRIAL BECAUSE OF THE ILLEGITIMATE PREJUDICE ENGENDERED BY AN ARTICLE APPEARING OCTOBER 29, 1976, IN THE BUFFALO COURIER-EXPRESS.

The factual situation depicted by the explanations offered to the Court by Richard Arcara, United States Attorney, and Federal Agent Gibbs, demonstrates convincingly a concerted action between the prosecution and the press. It is not reasonable to make those assumptions which each of these gentlemen claimed were made, that is, that the article would not appear during trial of this defendant. It is even less credible to assume that neither of these two individuals would have the curiosity to inquire of the author of the article what his plans were with reference to a publication date. Hopefully, the Federal Bureau of Investigation, at least, trains its personnel in a more effective fashion.

The article was in fact a dissertation that the Government was plagued with bank robberies in the suburbs, noted similarities in nine unsolved suburban bank robberies, "they take over the banks...vault the counter...always pick banks near thruway entrances ...they switch cars a short distance from the bank...use plastic garbage bags...always use long-barreled hand guns...they wear ski masks." Each similarity referred to was exactly the same as the proof at trial against these defendants. In addition, the article went on to say that over $150,000 has been stolen by this ring of eight members, and that "we have nearly a 100 per cent conviction

rate in bank holdups".

The prejudicial effect of this article is self evident. The Court merely questioned the jurors and one or two jurors admitted reading the newspaper but said they had not read the article; this in spite of the fact that two of these newspapers were found in the jury deliberation room the day the article appeared! It is naive to accept the jurors' statements as being forthright. They had been admonished daily not to read any articles in the newspapers and were undoubtedly afraid to admit they had.

Neither the United States Attorney or the F.B.I. should have permitted their respected offices to participate in discussions of unsolved bank robberies during the pendency of a bank robbery trial. The inevitable impact of this article, complete with photographs, was to associate these defendants with other bank robberies, stressing that the photographs showed the bandits wearing clothing similar to that allegedly worn by those men who had robbed the Chase Manhattan Bank on June 16, 1976.

> Where there is a showing that adverse publicity is a direct result of concerted action between the prosecutor and agents of the press, this amounts to misconduct depriving a defendant of a fair trial.
>
> Viereck v. United States, 130 F. 2d 945, at page 962.

POINT II

THE SUPPLEMENTAL INSTRUCTIONS, SOME OF WHICH WERE UNSOLICITED BY THE JURORS, EMPHASIZING ONCE AGAIN TO THE JURORS THAT CIRCUMSTANTIAL EVIDENCE WAS ENOUGH TO CONVICT, WAS IN THESE CIRCUMSTANCES SO PREJUDICIAL TO THE DEFENDANT AS TO WARRANT A MISTRIAL.

During deliberations (A-35) the jury asked the Court whether it could change a determination arrived at against one of the defendants. The Court indicated that this could be done anytime before a jury verdict was made public.

Although the jurors made no request of the Court for a definition of circumstantial evidence, the Court went on to emphasize that circumstantial evidence is good evidence.

From the content of the note to the Court, it was obvious that the jurors stood eleven to one for conviction. In the note the other jurors indicated a belief that he (the juror) would not convict because he would not accept circumstantial evidence.

In the light of the information disclosed in the note, the Court should have restricted its advice to that sought by the jurors. The continued admonition by the Court that circumstantial evidence is good evidence may have triggered the dissenting juror to fall into line without any real belief that the factual situation depicted from the testimony to convict a defendant or defendants.

The Court diverted the jurors from their earlier determination to remove from the docket the determination which had been arrived at against one defendant, and to presumably declare them-

selves unable to agree.

The situation was unique because it is seldom that a Court is aware, as the Court was in this instance, that the jurors stood eleven to one for conviction.

The prejudicial effect of the Court's behavior in urging the juror to accept the circumstantial evidence as sufficient is so serious as to require reversal of the conviction.

CONCLUSION

The conviction should be reversed.

DATED: March 14, 1977

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE UNITED STATES OF AMERICA

Appellee

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AFFIDAVIT

MICHAEL PATRICK BARRETT,
FERDINAND SANTANA
Defendants-Appellants

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

SALTEN RODENBERG, being duly sworn, deposes and says:

That on the 14th day of March, 1977, he personally served three copies of Brief for Defendant-Appellant Santana and Appendix for Defendant-Appellant Santana on the United States Attorney, United States Courthouse, Buffalo, New York.

Salten Rodenberg
Salten Rodenberg

Sworn to before me this
14th day of March, 1977

Suzanne Brownstein
Comm. of Deeds, Buffalo, N.Y.
My Comm. Expires 12-31-78